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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1972

~~72-~~664

DAVID CALVIN BECKER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO.

DAVID CALVIN BECKER,

Petitioner,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

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Petitioner, David Galvin Becker, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on July 13, 1972.

Opinions Below

The opinion of the Court of Appeals is as yet unreported. It is reprinted as Appendix A, infra. The opinion of the district court, denying the Petitioner's motion for a new trial based upon newly discovered evidence, is unreported. It is reprinted as Appendix B, infra.

Jurisdiction

The judgment of the Court of Appeals, (Appendix C, infra.) was entered on July 13, 1972. A timely Petition for Rehearing was filed, but was denied on October 4, 1972. (Appendix D, infra.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented for Review

1. Whether a federal criminal conviction may stand, where on a motion for a new trial based upon newly discovered evidence, the defendant proved that a government witness testified falsely as to a matter crucial to his defense?

2. Whether a sentence may stand, where the severity of that sentence was influenced by false testimony that the defendant had fabricated evidence at his trial?

3. Whether the government's knowing assertion of false testimony on appeal violates due process of law?

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person shall • • • be deprived of life, liberty, or property, without due process of law • • •."

Title 18, United States Code, Section 659 is reprinted as Appendix E, infra.

Statement of the case

Petitioner David Galvin Becker, the President of World Wide Warehouses, Inc., was indicted by a Grand Jury of the United States District Court for the Northern District of Illinois, and charged with a single violation of Title 18,

United States Code, Section 659. Specifically, the indictment charged Becker with the knowing and willful possession of 142 television sets, which had been stolen from an interstate shipment. Becker was tried before the Honorable Bernard Decker, and a jury. He was found guilty, and sentenced to a term of five years in the custody of the Attorney General of the United States. Subsequently he filed a motion for a new trial based upon the newly discovered evidence that a material prosecution witness had testified falsely at his trial. The motion was denied, and an appeal from that ruling was consolidated with Petitioner's appeal of his conviction.

Evidence at Trial

Prior to trial, a stipulation was entered into between the prosecution and the Petitioner, which left for trial the sole issue of whether Petitioner, the president of a warehousing firm, maintained possession of the sets in his warehouse knowing that they had been stolen.

To this end the government introduced evidence of the retail value of the sets, and testimony that Becker sold a small number of sets for cash at well below the market value. The government also attempted to show that documents prepared in connection with the receipt of the television sets were irregular.

Pursuant to a subpoena duces tecum Muriel Osten, an employee of World Wide Warehouse, produced certain documents relating to the receipt of the television sets. Among them was a non-negotiable warehouse receipt issued to Standard Distributing Company for the television sets, dated September 12, 1969 and subsequently designated Government's Exhibit 15. Mrs. Osten testified that she prepared the receipt on or about September

12, 1969. (Tr. 199-206) She subsequently stated that she could not recall the exact date of preparation, but that she prepared the receipt as soon as possible after the sets were received. (Tr. 381-2)

After Muriel Osten had testified that she prepared Government's Exhibit 15 on or about September 12, 1969, the government called one Robert Burns, the president of the firm which printed warehouse receipts for Petitioner. He testified that Petitioner had ordered two printings of warehouse receipts from his firm, one on September 19, 1968, and another in October, 1969. He identified a warehouse receipt designated Government's Exhibit 45 as a sample of the earlier printing of receipts taken from his own files He was not shown a sample receipt from the later printing.

Burns stated that by comparing Government's Exhibit 15, the receipt for the television sets dated September 12, 1969, with Government's Exhibit 45, the sample receipt from the September, 1968 order of forms, he could tell that Government's Exhibit 15 had not come from that first order of forms. Burns stated that Government's Exhibit 15 had come from the second order of forms, printed in October, 1969, and was therefore not in existence on the date it was alleged to have been prepared by Mrs. Osten.

The trial judge himself was later to term the origin of Government's Exhibit 15 a "crucial" and "integral" aspect of the defendant's case. (Memorandum opinion, App. 12)

During the conference on instructions the trial judge stated, in reference to Burns' testimony as to the origin of Government's Exhibit 15, "* * * I can say that it presents some very serious questions for me; it will present some serious questions for me relating to the witness, and, possibly, relating to someone else." (Tr. 390)

After the return of the verdict the trial judge ordered an investigation of Petitioner's attorneys, Martin Ashman and Bernard Brody. He stated, "I am going to direct the United States Attorney in this case to make a complete investigation dealing not only with the defendant, but also with the defendant's attorneys to determine the circumstances under which Exhibits 11 through 17 were prepared * * *". (Tr. 477)

Immediately prior to sentencing, the Assistant United States Attorney, speaking in aggravation, made the following statement to the trial judge:

> "I might also add * * * certain documents were produced that were ultimately proven to be absolutely phony documents used to further confuse the situation and cover up, that really shows the intent of this particular man to do this and on the motion to suppress, while it is not relevant to the trial, or in the trial, he said that these documents were made in the regular and ordinary course of his business. Again, this was totally false."[1] (Tr. 482)

The Motion for A New Trial Based Upon Newly Discovered Evidence.

In September, 1971, while an appeal from his conviction was pending before the United States Court of Appeals for the Seventh Circuit, the defendant filed in the district court a motion for a new trial based upon newly discovered

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[1] Although the trial judge ordered an investigation of all the documents prepared in connection with Petitioner's receipt of the stolen television sets, and although the prosecutor argued that "certain documents" were proven to be "phoney", the only evidence of fabrication was the false testimony of Burns concerning a *single* document, Government's Exhibit 15.

evidence, pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The motion, supported by sworn affidavits, showed that Burns had testified falsely that Government's Exhibit 15, the warehouse receipt issued for the television sets and dated September 12, 1969, had come from an order of forms which did not come into existence until October, 1969.

Attached to the motion were samples of the October, 1969 printing of warehouse receipts by Burns' firm. These receipts, no sample of which was produced at the trial, contained a three line heading. The receipts from the first order of printing of September, 1968, as evidenced by Government's Exhibit 45, contained a four line heading. Government's Exhibit 15, the questioned warehouse receipt dated September 12, 1969, also had a four line heading. Thus, the defendant showed by irrefutable physical evidence that Government's Exhibit 15 could not have come from the second printing of warehouse receipts as Burns had testified.

Petitioner also proved that Government's Exhibit 15 had in fact come from the first printing of receipts on September 19, 1968. The affidavit of Donald Doud, an expert examiner of questioned documents, was filed in support of the motion and stated,

> "Through careful examination of the evidence, including microscopic inspection and measurement of the printed characters on questioned and known documents, affiant was able to reach a positive opinion regarding the crash printing on Government Exhibit 15, as follows:
>
> A. It is affiant's opinion that the crash printing on Government Exhibit 15, the questioned warehouse receipt of 9/12/69, was prepared by the same printing plate used for those exemplar documents described un-

der the caption "Format 1".[2] Included among these documents are dated transactions of the World Wide Warehouse Company purportedly covering a period from 8/1/69 to 10/27/69. In short, insofar as the printing is concerned, this examination failed to disclose any anachronisms between Government Exhibit 15 and the exemplar specimens covering the same general span of time.

B. The crash printing design in the documents described under the caption "Format 2"[3] is patently different from that shown on Government Exhibit 15, being composed of only three lines of printing rather than four and manifesting other differences indicative of the use of a different printing plate. Included in this group of documents are purported transactions of World Wide Warehouse dated between 12/24/69 and 9/17/70."

The government presented no evidence rebutting Doud's conclusion that Government's Exhibit 15 came from the first printing of warehouse receipts. However the government theorized that the receipt could have come from a third printing, despite Burns' testimony that his firm printed only two orders of receipts for Petitioner, and his further testimony that his firm printed Government's Exhibit 15.

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[2] The "Format 1" documents which Doud compared with Government's Exhibit 15 included Government's Exhibit 45, the warehouse receipt which Burns identified as coming from the first order of printing, as well as several other receipts from that printing dated during a period from August 1, 1969 to October 27, 1969.

[3] The "Format 2" documents included warehouse receipts dated during a period from December 4, 1969 to November 17, 1970, and originating from the second printing ordered by World Wide Warehouse on October 28, 1969.

The Government's Knowing Use of False Testimony On Appeal

As a result of the trial court's direction to the Assistant United States Attorney to investigate the defendant, his attorneys Martin Ashman and Bernard Brody, and the exhibits designated Government's Exhibits 11 through 17, (Tr. 477) an indictment was returned on September 24, 1970 charging Muriel Osten with perjury. The first count charged that at Becker's trial she testified that she had prepared Government's Exhibit 15 on or about September 12, 1969, when in reality Government's Exhibit 15 was not in existence until October, 1969.

On October 27, 1970, subsequent to the return of that indictment, and prior to the filing of Petitioner's motion for a new trial based upon newly discovered evidence, attorneys for Muriel Osten had a conference with the Assistant United States Attorney who prosecuted Becker, and who was also responsible for the prosecution of Muriel Osten. (Becker Aff. 9)[4] Also present were Burns, the witness who had testified at Becker's trial that Government Exhibit 15 was fabricated, and an F.B.I. agent. The defense attorneys showed Burns and Sprague a sample of the second printing of warehouse receipts ordered by World Wide Warehouse in October, 1969, which contained a four line heading, and a copy of Government's Exhibit 15 with its three line heading. Burns then stated that he could have made a "ghastly" mistake when he testified that Government's Exhibit 15 had come from the second printing of receipts. (Becker Aff., p. 9-10)

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[4] "Becker Aff." refers to the affidavit of Petitioner Becker submitted in support of his motion for a new trial, which was certified as a supplement to the record on appeal.

As a result of this conference, a superseding indictment was returned against Muriel Osten, omitting the charge that her testimony concerning Government's Exhibit 15 was false because the exhibit was not in existence at the time it was alleged to have been prepared. During the course of the Muriel Osten trial, which commenced on May 19, 1971, the Assistant United States Attorney, who had also prosecuted Petitioner, made the following statement concerning Government's Exhibit 15:

> "Mr. Sprague: I stipulate, your Honor, that we didn't know this, of course, because there was no sample of the second printing, as to form when Burns testified so he could actually compare it. The only thing he had was a second printing. He didn't know what they looked like and he drew the conclusion that they came from the second printing. Now, we agree, since the F.B.I. was out there, that the second printing, that this form 15 could not have been from the second printing and it is three lines." (Osten Tr. 25)[5]

The government thus acknowledged on May 19, 1971 that Burns was in error when he testified at Petitioner's trial that Government's Exhibit 15 had come from the second order of warehouse forms produced by his firm in October, 1969. Yet in a brief filed on August 23, 1971 seeking affirmance of Becker's conviction, the government not only failed to make mention of this fact, but argued that Gov-

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[5] "Osten Tr." refers to the transcript of the trial of Muriel Osten, which was certified as a supplement to the record on appeal. Mrs. Osten subsequently entered a plea of nolo contendere to the charges of perjury, and was fined $1,000.00 on each of the three counts charged in the superseding indictment.

ernment's Exhibit 15 had come from the second printing of receipts. The government's brief stated:

> "We contend that Robert Burns was qualified as an expert to compare and give his opinion as to the printings of various warehouse forms in question, and also to the fact that Government Exhibit 15 was not from the first printing in 1968, but by the process of elimination had to be from the second printing in October, 1969." (Brief for Appellee, p. 35)

Only after Petitioner filed his motion for a new trial did the government acknowledge the false testimony. In a brief filed in support of the district court's denial of Petitioner's motion for a new trial the government subsequently said,

> "We admit that the defendant has shown that Mr. Burns was in error when he said that Government's Exhibit 15 was from a second printing in October, 1969, because a true copy of the October 1969 second printing is a three line heading and not a four line heading like Government's Exhibit 15." (Answer of Appellee to Supplemental Brief, p. 4)

> "In this case, the small amount of false testimony was inadvertent and unknown to the government at the time of trial." (Second Answer of Appellee to Supplemental Brief, p. 6)

REASONS FOR GRANTING THE WRIT

I.

Petitioner's conviction is the product of false prosecution testimony, and cannot be sustained.

This case presents a question of significance to the administration of criminal justice: May a conviction stand upon proof, submitted on a motion for a new trial based upon newly discovered evidence, that a prosecution witness testified falsely as to an issue crucial to the defense?

Petitioner, the president of a warehousing firm, was charged with the possession of goods which had been stolen from an interstate shipment. His defense to the charge was that he had received the goods in good faith, and in the ordinary course of his business. The warehouse receipt which he had issued for the goods was, in the words of the trial court, "crucial" and "integral" to this defense. (Appendix B, infra, App. 12). A prosecution witness testified falsely that this receipt was not in existence as of the date it was alleged to have been prepared. In a motion for a new trial based upon newly discovered evidence, Petitioner demonstrated that this witness had testified falsely in this respect.

Petitioner's conviction was therefore tainted by false testimony. This Court has previously indicated that such a conviction may not stand. In *Mesarosh* v. *United States*, 352 U.S. 1 (1956), a government witness had testified falsely as to a matter vital to the defense. The government conceded that the witness had testified falsely in other proceedings, and moved to remand the case from the Supreme

Court for a hearing on the truthfulness of his testimony against the defendant. This Court denied the motion, reversed the conviction, and remanded for a new trial. The Court said:

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial." 352 U.S. 1 at 9.
>
> • • •
>
> "This is a federal criminal case and this Court has supervisory jurisdiction over the proceedings of the Federal Courts. If it has any duty to perform in this regard it has to see that the waters of justice are not polluted. Pollution having taken place here, the conviction should be remedied at the earliest opportunity." 352 U.S. 1 at 14.

Other authorities have similarly recognized that a federal criminal conviction tainted by false testimony is intolerable. Thus Moore has said:

> "A distinction is often made between wilfull subornation of perjury which obviously should give rise to a new trial, and perjured testimony which was unknown to the prosecutor at trial. This distinction may have some validity for due process purposes, where the argument is pegged to some official act or admission, but it should have none where the court acts under Rule 33 or in the exercise of its supervisory powers, as in the *Mesarosh* case. It must be remembered that the power conferred upon the court to grant a new trial for newly discovered evidence is simply a means to protect the integrity of the fact-finding process and to insure a fair trial for the accused, and its exercise is in no way predicated upon finding a violation of constitutional dimension." Moore, *Federal Practice*, 33.06 (2d ed. 1970)

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manufactured evidence, by ordering an investigation of Petitioner's attorneys, Martin Ashman and Bernard Brody. The Judge said,

> "I am going to direct the United States Attorney in this case to make a complete investigation dealing not only with the defendant but also with the defendant's attorneys to determine the circumstances under which • • • Exhibits 11 through 17 were prepared, and I wish to have you present that request to Mr. Foran as a personal request from the Court to make a complete and thorough investigation and I would like that matter reported back home." (Tr. 477)

The effect of the false testimony on Petitioner's sentence is further illustrated by the statement of the Assistant United States Attorney, made in aggravation immediately prior to the imposition of sentence:

> "I might also add • • • certain documents were produced that were ultimately proven to be absolutely phony documents used to further confuse the situation and cover up, that really shows the intent of this particular man to do this and on the motion to suppress, while it is not relevant to the trial, or in the trial, he said that these documents were made in the regular and ordinary course of his business. Again, this was totally false." (Tr. 482)

In *Townsend* v. *Burke,* 334 U.S. 736 (1948), the Court held that where a sentence was imposed upon an inaccurate presentence investigation report, the defendant had been denied due process of law. In *United States* v. *Tucker,* 92 S.Ct. 589 (1972), the Court held that the possibility that a court would have imposed a less stringent sentence, had it been aware that two of three prior felony convictions of the defendant were invalid, required a remand for resentencing. We ask this Court to consider whether, con-

sonant with these prior decisions, a sentence may stand where false testimony that the defendant had manufactured evidenced influenced the severity of that sentence.

III.

The government's knowing use of false testimony on appeal denied Petitioner due process of law.

At trial, the government was unaware that Robert Burns testified falsely that Government's Exhibit 15 was from a printing of warehouse receipts which was not in existence when Petitioner received the television sets. While Petitioner's appeal from that conviction was pending however, the government was advised that Burns had testified falsely, and shown proof that Government's Exhibit 15 had not come from the second printing of warehouse receipts as he had testified. During the course of the perjury trial of Muriel Osten, the government admitted that Burns was mistaken in this regard. (Osten Tr. 25). Subsequent to this admission, however, in a brief filed in the Court of Appeals seeking affirmance of the Petitioner's conviction, the government stated:

> "We contend that Robert Burns was qualified as an expert to compare and give his opinion as to the printings of various warehouse forms in question, and also to the fact that Government Exhibit 15 was not from the first printing in 1968, but by the process of elimination had to be from the second printing in October, 1969." (Brief for Appellee, United States v. Becker, p. 35)

After the Petitioner had filed his motion for a new trial the government did admit, in briefs filed in opposition, that Burns was wrong in testifying that Government's Exhibit 15 had come from the October, 1969 printing of warehouse

forms. Yet prior to the filing of a brief asserting the correctness of that testimony, the government was shown, and in fact did acknowledge, proof of its falsity. We submit that this conduct falls squarely within the rule of *Napue* v. *Illinois*, 360 U.S. 264 (1959).

Conclusion

For the foregoing reasons, Petitioner respectfully submits that the petition for certiorari should be granted.

Respectfully submitted,

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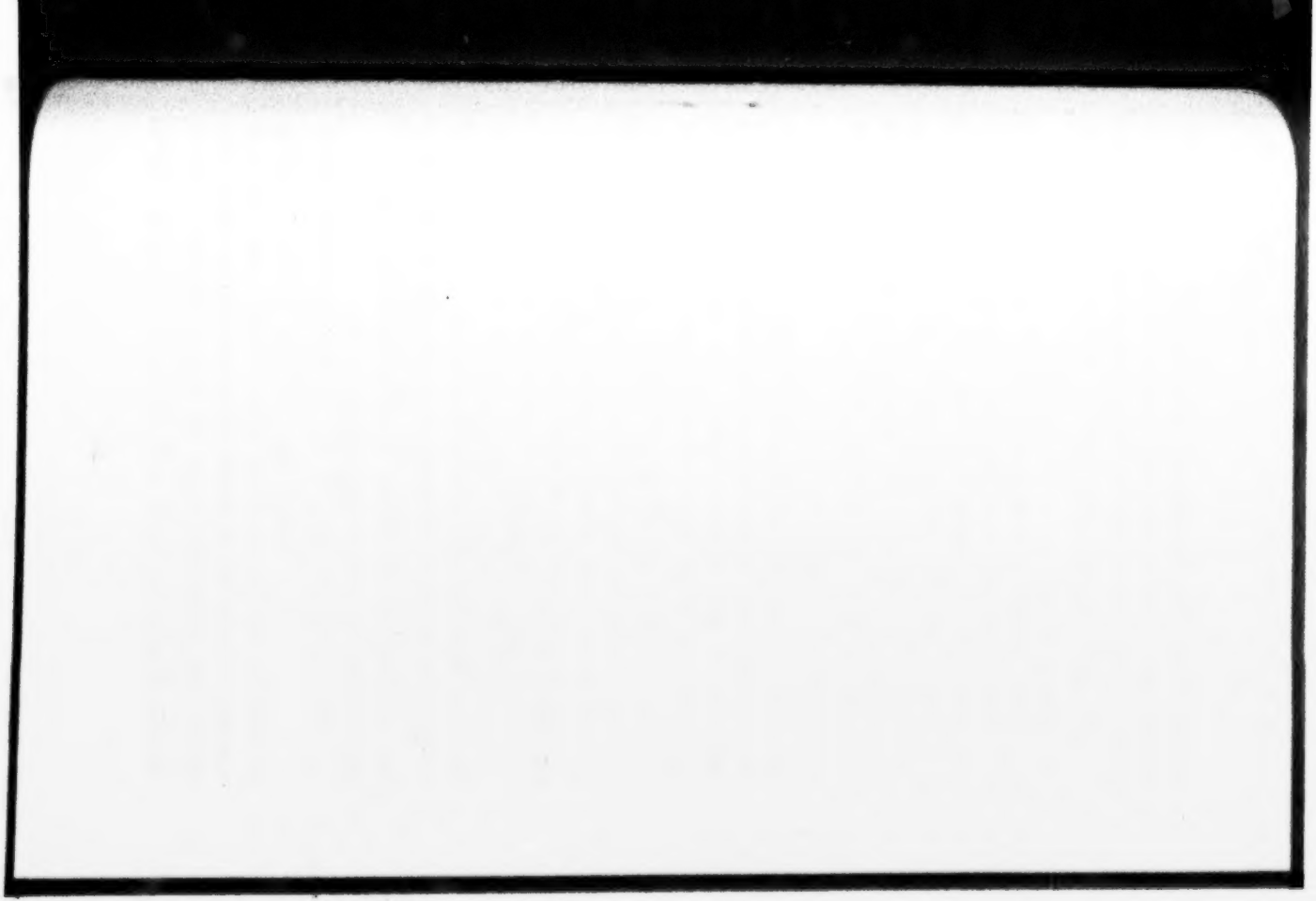

had been consigned to him by a Standard Distributing Company, and that he had been given authority to sell the TV sets with net proceeds to be sent to Standard.

There was ample testimony from which the jury could infer that Becker had not previously stored new TV sets in his warehouse; that he was not an authorized Sears dealer; that he received and warehoused the stolen TV sets on or about September 12, 1969; that he did not send a copy of the warehouse receipt of the TV sets to Standard, although it was customary to send copies to shippers; that shortly after receiving the stolen TV sets he was selling them at prices suspiciously below cost; and that he sold the stolen TV sets COD-cash only, and gave no receipt to the buyer although it was normal to do so.

Mrs. Osten, Becker's secretary for eleven years, testified[2] that the shipment of the new Sears TV sets from which Becker made subsequent sales arrived at the warehouse on or about September 12, 1969, and that the shipment was from the Standard Distributing Company. She also testified that although she made out a warehouse receipt to Standard dated September 12, 1969 (Exhibit 15), she sent to Standard neither a receipt for the shipment nor the net proceeds of the sales, although it was normal practice to do so. Mrs. Osten said that the reason for this was that she knew neither the name of the person who arranged for the warehousing of the TV sets nor the address of Standard to which she could send a receipt for the goods.

Mrs. Osten's testimony generally was vague, confused and confusing. The jury could well consider incredible her testimony that she did not know where to send the pro-

[2] Mrs. Osten first testified as a witness for the government, and later testified in defense of Becker.

ceeds from or the receipts for the TV sets — especially in view of the aggregate value of the shipment, approximating $40,000. And her testimony with respect to a bill of lading dated September 16, 1969, covering sales from the stolen shipment, is virtually incomprehensible. Clearly she equivocated in her testimony that bore upon Becker's scienter, especially with respect to the shipment from Standard, and as to when she typed the warehouse receipt for the stolen sets.

The government, to offset Mrs. Osten's testimony that she had typed a receipt for the TV sets dated September 12, 1969 (Exhibit 15), called as its witness Burns, a printer of warehouse receipt forms and expert on the subject. Burns testified that upon order from Becker he had twice printed forms for World Wide Warehouse, Inc — once in 1968 and again in the fall of 1969. He also testified that the receipt form (Exhibit 15) typed by Mrs. Osten and dated September 12, 1969 could not have existed[3] on September 12, 1969, since it was from the second printing order, which had not been delivered to Becker's warehouse until October of 1969.

We think that the foregoing testimony was sufficient prima facie for an inference that Standard was a fictional company, that Becker did not receive the shipment of the TV sets in the regular course of business, and that he knew that the TV sets which he received and sold were stolen.

Becker's defense consisted of testimony of two customers that in their dealing with World Wide Warehouse,

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[3] Burns examined and compared Exhibit 15 (receipt dated September 12, 1969) with Exhibit 45 (receipt of the first printing order). He testified that Exhibit 15 could not have been from the first printing order since it failed to "align" completely with Exhibit 45.

the merchandise they stored would be sold, with their consent, and that the net proceeds of the sales would be sent to them. Mrs. Osten testified in defense also. Her testimony was of the same vague and confusing character that marked her testimony for the government on direct and on cross-examination.[4] The jury was justified in believing beyond a reasonable doubt that Standard Distributing Company was fictional, was not in existence at the time Becker received the sets, and that Mrs. Osten was equivocating to protect Becker. The inference of Becker's scienter could reasonably follow. We conclude that there is no merit in Becker's contention that his guilty knowledge was not proven beyond a reasonable doubt.

We see no merit in Becker's contention that the testimony of Pearlstein, the buyer of Sears TV sets from Becker, was not connected to the stolen Sears shipment. Pearlstein testified that the sets he purchased from Becker on September 16 and 17 were new, and that he had never seen a new Sears TV set, or a Sears TV carton, at Becker's before. Moreover, he testified that the TV sets which he purchased were in the same type boxes as those shown in the stipulation. Clearly his testimony made the connection.

Next Becker claims that witness Burns was not qualified as an expert to testify that the incriminating warehouse receipt (Exhibit 15), supposedly typed by Mrs. Osten on September 12, 1969, had to be from the second printing

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[4] The district court judge suspected the testimony of Mrs. Osten. He characterized her as, inter alia, a "very equivocal witness with a convenient memory." At the trial he directed the district attorney to investigate her testimony. After this court remanded the case for the hearing of the new trial motion, Mrs. Osten was indicted for perjury in her testimony at the trial. She was found guilty on three counts at a bench trial after entering a plea of *nolo contendere*, and fined $1,000.00 on each count.

of warehouse forms which were only delivered to Becker's warehouse in October, 1969.

The claim is frivolous. Burns had been in the business of printing warehouse forms for 24 years. His firm was official printer for two leading warehousemen associations in the country. His testimony showed that he was fully qualified to identify the pertinent receipt as he did.

We have read the portions of the transcript relied upon by Becker in his contention that the trial judge, by interrogation of witnesses and comments to defense counsel, prejudiced the trial. We cannot agree that any prejudice to Becker was likely to result from the interrogation or comments or both.

Finally, we see no basis for reversal of the conviction because of any claimed errors in the conduct of the district attorney, or in the instructions to the jury, as to which there was no objection at the trial.

PART II.

Becker based his motion for new trial on "newly discovered evidence" and supported the motion with his own affidavit as well as that of document expert Doud. Together the affidavits effectually claimed 1) that the "fabrication" of Exhibit 15 was a "crucial" issue at the trial; 2) that Becker was surprised and unable to meet the Burns testimony on that issue; 3) that after the trial Burns admitted he might have been mistaken whether Exhibit 15 came from the second printing of warehouse forms; that it was Doud's expert opinion that Exhibit 15 did not belong to the second printing; 4) that Becker had shown diligence in discovering the new evidence; and 5) that a new trial would most likely result in an acquittal of Becker. After a hearing, the judge who presided at the Becker trial denied the new trial motion and filed a written opinion.

The opinion recites the trial testimony of Burns that Exhibit 15 was from a second printing of forms. The opinion also notes the affidavit of Doud which tended to corroborate the statement of Burns that he may have mistaken as to when the warehouse receipt dated September 12 was printed.

The judge applied this court's decision in *Larrison* v. *United States*, 24 F.2d 82, 87 (7th Cir. 1928), confirmed in *United States* v. *Johnson*, 149 F.2d 31, 44 (7th Cir. 1945),[5] in deciding that Becker's proffered "newly discovered" evidence plainly did not meet two requirements of the *Larrison* rule, *i.e.*, did not show that Becker was surprised by, and unable to meet, at the trial, the Burns testimony; and did not show that without that testimony the jury "might" have reached a different conclusion. The judge thought it unnecessary to consider the third requirement of *Larrison*, *i.e.*, whether the testimony of Burns was shown to be false.

It is conceded by Becker that the judge properly applied *Larrison*. He argues that the judge erred in concluding that Becker failed to meet two of the three Larrison requirements.

We find no merit in Becker's contention. His affidavit, proffered to show the element of surprise and inability to meet the Burns testimony, did not compel the district judge to decide either that Becker was surprised or unable to meet the testimony of Burns at the trial. The testimony of Mrs. Osten was material at the trial since she was the only witness who gave testimony which could have precluded a finding of scienter in Becker's possession of the stolen TV sets. Her testimony that the TV

[5] See also *United States* v. *Higgins*, 412 F.2d 789, 790 (7th Cir. 1969).

sets were received in the ordinary course of business was critical for Becker. The Burns testimony effectually overcame Mrs. Osten's testimony. Becker's attorney cross-examined Burns, but did not touch upon Burns' testimony with respect to identifying Exhibit 15. Despite argument in Becker's supplemental brief to the contrary, the record shows that Becker's attorney did not ask for a continuance for the purpose of meeting the testimony of Burns.

It is true that before cross-examining Burns the defense attorney stated that he needed "some time to study something here" and that he could not cross-examine without time to "study this." The court said the attorney could "look at them right now." The attorney said "All right," and asked for the "exhibits." He then proceeded to cross-examine.

At the end of the testimony, the day before the court instructed the jury, the court inquired of Becker's attorney whether he had any defense witnesses other than the three who testified. The attorney made no mention of any witness to controvert the testimony of Burns. The judge at the new trial hearing could well have decided that the "newly discovered" evidence did not show diligence because Becker did not seek time to find an expert like Doud to give an opinion contrary to Burns — as Doud does in his affidavit.[6]

Becker argues that it is "incomprehensible" how anyone could be anything but surprised at the Burns "false" testimony. This argument implies knowledge of falsity at the trial and is additional support for the judge's view that no showing is made of diligence in challenging effectively that "false" testimony.

The judge determined that another jury would come to the same conclusion at a second trial "regardless" of the

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[6] We note also that Becker waited more than 15 months after the trial before filing his motion of "newly discovered" evidence.

truth or falsity of the Burns testimony. The record supports the finding of the judge that the evidence, putting aside Mrs. Osten's testimony, is "overwhelming" and that at the second trial Becker would be "deprived" of her testimony. We take "deprived" to mean that it was quite unlikely, in view of her conviction of perjury with respect to her testimony at the Becker trial, that she would be called, since, in the circumstances, her testimony would be of little effect in aid of Becker. Furthermore, Doud's affidavit does not "show[s] conclusively" that Exhibit 15 came from the first printing of warehouse receipt forms in 1968. His affidavit merely expresses his opinion, and Burns admittedly adheres to his contrary opinion. And the transcript of evidence of the Osten perjury proceedings shows the availability of government testimony to corroborate the Burns' opinion.

Finally, we see no merit in Becker's claim that his right to due process was violated by the government's knowing use of false testimony at the trial. We shall assume, but not decide, that the Burns' testimony was mistaken. The claim nevertheless has no merit. The record is devoid of anything to show that the government had knowledge, before calling Burns to testify, that he would make the mistake he made in his testimony at the trial.

For the reasons given, we conclude that the district court judge did not abuse his discretion in denying Becker's motion for a new trial.

The judgment of conviction is AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- VS. -

DAVID GALVIN BECKER,

Defendant-Appellant.

No. 70-CR-46

MEMORANDUM OPINION

This is a motion for a new trial based upon newly discovered evidence made by David Becker pursuant to Rule 33 F.R.Crim.P. It is based upon the following facts.

Becker was convicted of knowingly possessing goods which were stolen from interstate commerce in violation of 18 U.S.C. §659. At the jury trial on this cause, the defendant did not dispute the fact that the television sets which were stored in his warehouse were stolen. Rather, his plea of not guilty was designed to compel the government to sustain its burden of proof with regard to the issue of whether the defendant knew that the goods were stolen.

The government sought to carry this burden by presenting two lines of proof. The first consisted of evidence that the defendant had sold two of the stolen television sets to one Howard Pearlstein. This transaction was a cash sale at a price well below the current market value of the sets. The other line of proof was designed to refute the

defendant's story that the sets in question were received by him in the normal course of his business from a man who he had never even heard of before and who left the $40,000 worth of goods without signing his name or getting his receipt. The main basis for this story was the testimony of one Muriel Osten. She testified to the effect that she had talked to a man from Standard Distributing Company about the goods in question and had later prepared a warehouse receipt purporting to show receipt of the stolen sets by World Wide Warehouse, Inc., a corporation owned and operated by the defendant. Miss Osten was subsequently convicted of perjury on the basis of this testimony. Aside from its cross-examination of Miss Osten, the government also placed a Mr. Robert Burns, a manufacturer of warehouse receipts, on the stand, in an effort to refute the Osten testimony. Defendant bases his present motion upon that testimony.

Mr. Burns testified to the effect that the warehouse receipt which represented the stolen sets was not printed until after it was alleged by the defendant to have been prepared. Subsequent to Mr. Becker's trial, during the preparation for the Osten perjury trial, Mr. Burns stated that he may have been mistaken about exactly when the document in question was printed. In addition, the defendant has produced a printing expert whose affidavit tends to show that Mr. Burns was mistaken. It should be pointed out, however, that neither side can prove whether the warehouse receipt in question was printed before or after it was allegedly prepared. It is on this slender thread that the defendant rests his motion for a new trial.

It is well established that motions for a new trial are not favored by the courts and are viewed with great caution. See *e.g.*, *U. S.* v. *Gleason*, 411 F.2d 1091 (10th Cir.

1969). Further, it is clear that in order for a motion for a new trial on the basis of newly discovered evidence to be granted, the movant must show (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial, (2) that the evidence is material, not merely cumulative or impeaching, (3) that it will probably produce an acquittal, and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant. Barron, *Federal Practice and Procedure,* Vol. 4, §2282, at p. 284, and the numerous cases cited therein. However, it is the rule in this Circuit that even if the evidence at issue is merely impeaching, as it was in this case, a new trial should be granted if the movant reasonably satisfies the court (1) that the testimony given by a material witness is false, (2) that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it, or did not know of its falsity until after trial, and (3) that without it, the jury might have reached a different conclusion. *Larrison* v. *U. S.,* 24 F.2d 82 (7th Cir. 1928), and *U. S.* v. *Higgins,* 412 F.2d 789 (7th Cir. 1969).

In the case at bar, the defendant cannot meet the requirements of the *Larrison* rule because, leaving aside the serious problem of whether the testimony of Mr. Burns has been shown to be false, it is plain that the other two requirements have not been met. Since proving the existence of the warehouse receipt was a crucial aspect of his case, the defendant could not argue that he realized the alleged falsity of the statement after the time of trial. Further, since it was such an integral facet of his case, it is difficult to believe that the defendant was taken by surprise when the testimony was given or that he was unable to meet it. Finally, it should be noted that most of the defendant's

arguments in this regard go toward showing that the testimony was false and there is little but a few self-serving conclusory statements to show that the defendant was actually "surprised". Accordingly, the defendant has not met his burden in this respect.

In addition, I am of the opinion that another jury would come to the same conclusion regardless of the truth or falsity of the Burn's testimony. It is beyond belief that a jury which had before it the evidence of the cash sale of such stolen goods at bargain prices could believe that Becker received the $40,000 worth of goods from an unknown man who did not sign his name or get a receipt even though that was Becker's business practice. Further, at any new trial, the defendant would be deprived of some or all of the testimony of Muriel Osten. Finally, it is clear now, just as it was clear at the time of the trial, that the evidence presented by the prosecution overwhelmingly proves beyond any doubt whatsoever that the defendant was guilty as charged.

In light of the foregoing, the defendant's motion for a new trial based upon newly discovered evidence is hereby denied.

ENTER:

/s/ *Bernard Decker*
United States District Judge.

DATED: October 8, 1971.

APPENDIX C

UNITED STATES COURT OF APPEALS

For The Seventh Circuit
Chicago, Illinois 60604

July 13, 1972

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. JOHN S. HASTINGS, *Senior Circuit Judge*
HON. ROGER J. KILEY, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 18659 vs.

DAVID GALVIN BECKER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of conviction of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

October 4, 1972

Before
HON. ROGER J. KILEY, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 18659 vs.

DAVID GAVIN BECKER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70-CR-46

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby DENIED.

APPENDIX E

EMBEZZLEMENT AND THEFT

§ 659. *Interstate or foreign baggage, express or freight; State prosecutions*

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage,

goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen —

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods,

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. June 25, 1948, c. 645, 62 Stat. 729; May 24, 1949, c. 139, § 13, 63 Stat. 91.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-664

DAVID CALVIN BECKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of the knowing possession of goods which had been stolen from an interstate shipment, in violation of 18 U.S.C. 659. He received a sentence of five years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (Tr. 483-484). While an appeal was pending in the court of appeals, petitioner moved for a new trial in the district court based upon newly discovered evidence. After a hearing, the district court denied the motion (Pet. App. B). Thereafter the court of appeals, which

491-647—72

had postponed decision pending a ruling on the new-trial motion, affirmed both the conviction and the denial of the motion for a new trial (Pet. App. A).

1. At the trial it was stipulated that in September 1969, 142 cartons containing Sears Roebuck & Company television sets, each valued in excess of $100.00, were stolen while part of an interstate shipment moving through Chicago, Illinois and that shortly thereafter the cartons were received by petitioner at the warehouse of his corporation, World Wide Warehouse, Inc., in Chicago (Tr. 102–105).

The remaining element of the offense to be established was petitioner's knowledge that the television sets in his possession had been stolen. On this aspect of the case the evidence showed that in September 1969, petitioner sold several new Sears television sets to one Howard Pearlstein at a price well below their current market value (Tr. 140–163). Pearlstein paid cash, at petitioner's insistence, but he neither requested, nor was he given, any receipt (Tr. 143–144, 151–153, 160–162, 260). At the time of these transactions, Sears sold its television sets exclusively through Sears' own outlets, and no Sears warehouse or authorized storage place was located at petitioner's warehouse (Tr. 117–119).

Miss Muriel Osten, petitioner's secretary and bookkeeper (Tr. 181–183, 265), testified that she prepared a warehouse receipt for the television sets around September 12, 1969, the day that they were allegedly delivered to petitioner's warehouse by a "Standard

Distributing Company" (Tr. 199–203, 233, 237, 244).[1] The government, to offset her testimony, called as a witness Robert Burns, president of the printing company which supplied petitioner's corporation with its warehouse forms (Tr. 296–297). He testified that his company had twice printed such forms for petitioner, in September 1968 and October 1969 (Tr. 311–313). Comparing the warehouse receipt issued for the television sets (allegedly prepared around September 12, 1969) with a sample form from the first printing (delivered to petitioner in September 1968), Burns gave his opinion that the receipt for the sets was not from the first printing of forms (Tr. 317–319). Although not provided with a sample from the second printing to use for comparison purposes, Burns concluded that the receipt issued for the sets must have come from the second printing, which was not delivered to petitioner until October 1969 (Tr. 320–321). Thus, Burns' testimony tended to show that the warehouse receipt issued for the sets was a fabrication.

[1] Miss Osten testified for the prosecution and the defense. Through her testimony, petitioner sought to show that he had received the television sets in the normal course of his business from a man identifying himself with a "Standard Distributing Company" (Tr. 272, 357–362, 365–367). According to this testimony, petitioner never learned the man's name or his company's address, although it was customary to do so (Tr. 239–240, 272, 371,, 373). On cross-examination Miss Osten stated, contrary to her previous testimony as a prosecution witness, that she could not recall when she had prepared the warehouse receipt for the sets (Tr. 380–383). Her testimony in this case subsequently resulted in her conviction for perjury (Pet. App. A 5, n. 4).

Petitioner filed a motion for new trial in the district court more than 15 months after his conviction, alleging "newly discovered evidence" establishing that Burns had testified falsely at the trial. The motion was based on the affidavit of document expert Donald Doud, which indicated that the warehouse receipt issued for the television sets could not have belonged to the second printing of forms. In Doud's opinion, the receipt in question had come from the first printing (Pet. 6–7). After a hearing, the district court denied the motion in a written opinion (Pet. App. B).

2. Petitioner contends here, as he did below, that the district court abused its discretion by denying a new trial (Pet. 11–14). This contention was fully considered by the court of appeals and was properly rejected in Part II of its opinion upon which we rely (Pet. App. A 6–9). Applying the rules set forth in *Larrison* v. *United States*, 24 F.2d 82 (C.A. 7), the court held that petitioner had failed to show either that he was unable to meet the Burns testimony or that a second trial might have a different outcome (Pet. App. A 7–9). The court pointed out that the Doud affidavit did not "show conclusively" that Burns' testimony was mistaken, but only presented a contrary expert opinion (Pet. App. A 9). Thus this is not a case in which perjury by a government witness has been committed; indeed, it is not even certain that the witness's testimony was mistaken. Rather, the courts below found that in the context of this trial it was unnecessary to decide whether Burns inadvertently had given erroneous testimony, since other

evidence overwhelmingly established petitioner's guilty knowledge and a new trial would not have led to a different result (Pet. App. B 13).

We point out in addition that petitioner's reliance (Pet. 11–13) on *Mesarosh* v. *United States*, 352 U.S. 1, is misplaced. In that case the government had discredited the credibility of a key government witness by revealing that in other proceedings he had given extensive false testimony which was either perjurious or resulted from a psychiatric disorder. In contrast, as we have explained, this case involves not false or discredited testimony but rather an honest expert opinion, the accuracy of which could have been, but was not, challenged at trial by cross-examination or the presentation of contrary expert opinion. *Mesarosh* does not stand for the proposition that a defendant may obtain a new trial on the basis of his own failure to offer expert defense witnesses at the proper time.[2]

3. Petitioner now contends for the first time that the Burns testimony influenced the trial court to impose a more severe sentence (Pet. 14–16). Petitioner

[2] Petitioner also urges the Court to resolve an alleged conflict among the circuits as to whether the use of perjurious testimony must be willful to violate due process (Pet. 14). This case presents no such issue since the Burns testimony, at most, was shown to have been partially mistaken. The only witness who committed perjury was Miss Osten, who testified favorably to the defense (Pet. App. B 11; see note 1, *supra*). Moreover, while it is settled that a conviction resulting from the prosecution's willful use of perjury cannot stand (*Miller* v. *Pate*, 386 U.S. 1), in the absence of such misconduct, the standard used by the courts below in judging petitioner's new trial motion was proper. See *United States* v. *Strauss*, 443 F. 2d 986, 989–990 (C.A. 1), certiorari denied, 404 U.S. 851.

has not moved for a reduction in sentence pursuant to Rule 35, Fed. R. Crim. P., and this issue is not properly before the Court. *Lawn* v. *United States*, 355 U.S. 339.

4. Petitioner's related contention that the government wilfully asserted the truth of the "false" Burns testimony in its brief filed in the court of appeals is without foundation. The statement in the government brief upon which petitioner relies related to Burns' qualifications to give his expert opinion, not to the correctness of the opinion given. Burns' competence as an expert witness was being challenged on the initial appeal, and it was on that point that the government had argued—and the court below later agreed (Pet. App. A 5–6)—that his testimony was admissible.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

No. 72-664

DEC 27 19

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1972

DAVID CALVIN BECKER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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RESPONSE TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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RONALD N. HEFTMAN
on the Brief

In the
Supreme Court of the United States

OCTOBER TERM, 1972

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

RESPONSE TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Solicitor General in his memorandum in opposition to the Petition for Certiorari states that "Thus this is not a case in which perjury by a government witness has been committed; indeed, it is not even certain that the witness' testimony was mistaken." This statement by the government is contrary to prior admissions by the United States Attorneys in two briefs filed in the United States Court of Appeals. In the first answer of the government to Peti-

tioner's Brief, the United States Attorney stated, "We admit that the defendant has shown Mr. Burns was in error when he said that Government's Exhibit 15 was from a second printing." (Answer of Appellee to Supplemental Brief, p. 4) In a second answer of the government to the petitioner's supplemental brief, the United States Attorney admitted, "In this case, the small amount of false testimony was inadvertent and unknown at the time of the trial." The false testimony referred to documents which were found by the trial judge to be "crucial" and integral to the petitioner's defense. The United States Court of Appeals in its Opinion either ignored or failed to note the admissions of the United States Attorneys in their briefs.

At another point in his memorandum the Solicitor General contradicts the above statement by stating that Government's witness Burns' testimony tended to show that the warehouse receipt, Government Exhibit 15, the document considered by the trial court to be "crucial and integral to the defense" was a fabrication (govt's mem. p. 3).

The petitioner was sentenced on June 23, 1970. On October 27, 1970, the United States Attorneys prosecuting the case, the government witness Burns and an F.B.I. agent, an expert on questioned documents, were shown conclusive proof that Government's Exhibit 15 was not fabricated, and that Burns stated he could have made a ghastly mistake. (Becker's Aff. in support of motion for a new trial based on newly discovered evidence.) However, the United States Attorneys who prosecuted the case did nothing to call to the Court's attention that they had learned shortly after the conviction that the document was not fabricated, nor did they inform the trial court that its belief that petitioner and his lawyers were involved in fabrication of the document was unwarranted.

The government argues that the accuracy of Burns' testimony could have been challenged by cross-examination. The petitioner could not readily break down the so-called expert by cross examination without the assistance of an expert to advise him. If the testimony was false, the failure of cross-examination does not effect the claim that the petitioner was convicted on false testimony. However it is important for this court to know that when Burns finished his direct examination, counsel for the petitioner asked for a recess to assess and to determine how to meet the unexpected and devastating testimony of Burns. This request for a recess was for only a few minutes, but this reasonable request was rejected. We suggest that this arbitrary ruling by the trial court was caused by the trial court's ire at what he believed was a fabrication of the document by the petitioner and his lawyers. This view was later demonstrated by its order on the United States Attorneys to investigate not only the defendant but also his lawyers regarding the documents which the trial court believed were a fabrication, an accusation which was later proved to be incorrect. The issue in this case is whether a conviction based on false testimony of a material matter given by a government witness should be permitted to stand, and not whether cross examination of the witness could have proved the witness to have given false testimony.

The Solicitor General argues that the petitioner contends for the first time that Burns' false testimony influenced the District Court in sentencing the defendant and therefore this issue is not before the court. This argument is without the slightest merit. The motion for a new trial based on newly discovered evidence raised the issue of the impact upon the Judge as a result of what he believed to be fabricated testimony. This was indicated by the action of the trial judge who ordered a full scale investiga-

tion of the defendant and his lawyers concerning the documents. And, when the petitioner came before the trial court for sentencing, the prosecuting attorney argued that the defendant used a phony document to cover up his guilt, (Tr. 82) and thereupon the trial court proceeded to sentence him to a maximum term of 5 years imprisonment. This was a severe and unjust penalty to be meted out to the petitioner because of the trial Court's mistaken belief that petitioner attempted to cover up his guilt by the use of a fabricated document.

We submit that this court should not permit the integrity of our judicial system be diminished by permitting an accused to be convicted on false testimony on a material issue and where the court was influenced in passing sentence on the petitioner by the false testimony. Due process of law and the fair administration of justice require that the petitioner be given a new trial.

Respectfully submitted,

CHARLES A. BELLOWS
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on the Brief